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Unsafe at Any [Modem] Speed: Indecent Communications via Computer and the Communications Decency Act of 1996

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UNSAFE AT ANY [MODEM] SPEED: INDECENT UNSAFE AT ANY [MODEM] SPEED: INDECENT COMMUNICATIONS VIA COMPUTER AND THE COMMUNICATIONS DECENCY ACT OF 1996

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INTRODUCTION

{1} The Communications Decency Act of 1996 ("CDA") is an essential tool, and a constitutional one, both for protecting children from the harmful effects of exposure to indecent communications and for preserving to parents the opportunity to have all the advantages the future holds in online computer networking without requiring them to risk exposing their minor children to obscene or indecent

communications.

{2} Until the enactment of the Communications Decency Act of 1996, those concerned about exposure to online indecency bore the burden of taking steps to avoid even undesired and unpredictable exposure to indecent communications. Consequently, parents unwilling to hazard guesses about the circumstances in which their child(ren) might come in contact with indecency had few choices. They could become "cyberisolationists," severing the telephonic umbillicus connecting their computers to the outside world. In the process, of course, those parents would deny to themselves and their children the many benefits of access to the Internet and other computer networks. Or, they could pay full prices for online services (e.g., America Online ("AOL") , Prodigy or Compuserve), knowing full well that their need to carefully filter content would result in paying for services of which they could take no advantage, having eliminated their availability with parental control features. Or, beginning in the summer of 1995, they could purchase one of the software packages designed to filter the sites to which their children could gain access on the Internet. Those programs provide imperfect perfection, becoming dated as new indecent sites appear on the Internet. Thus, in addition to the initial cost of such programs, vigilant parents would have to commit themselves to the purchase of continuing updates of their software.

{3} As demonstrated within, Congress concluded (1) that online indecency was inappropriate for minor children, and (2) that the government's compelling interest in preventing exposure of children to such indecency was not being effectively served by the existing approaches to online indecency. The existing approaches to the segregation of children from indecency, described above in brief, all shared the common feature of imposing the burden of avoiding exposure to indecency on the recipient/viewer. Congress' decision to shift the burden of responsibility for indecency to those who create it and transmit it reflects Congress' conclusions about the failure of existing approaches as well as an economy of action.

{4} When key members of Congress began building the record to support legislation designed to address the problem of online indecency, some members took inspiration in a prayer offered by the Senate's chaplain, the Reverend Lloyd Ogilvie:

> Almighty God, Lord of all life, we praise You for the advancements in computerized communications that we enjoy in our time. Sadly, however, there are those who are littering this information super-highway with obscene, indecent, and destructive pornography. Virtual but virtueless reality is projected in the most twisted, sick misuse of sexuality. Violent people with sexual pathology are able to stalk and harass the innocent. Cyber solicitation of teenagers reveals the dark side of online victimization. Lord, we are profoundly concerned about the impact of this on our children. We have learned from careful study how children can become addicted to pornography at an early age. Their understanding and appreciation of Your gift of sexuality can be denigrated and eventually debilitated. Pornography disallowed in print and the mail is now readily available to young children who learn how to use the computer.
>
> Oh God, help us care for our children. Give us wisdom to create regulations that will protect the innocent. In times past, You have used the Senate to deal with problems of air and water pollution, and the misuse of our natural resources. Lord, give us courage to balance our reverence for freedom of speech with responsibility for what is said and depicted.
>
> Now, guide the Senators when they consider ways of controlling the pollution of computer communications and how to preserve one of our greatest resources: The minds of our children and the future and moral strength of our Nation. Amen. [1]

SUMMARY

{5} A computer equipped with a modem for communications truly gives one an eye on the world. With a computer and a modem, access to the Internet is relatively simple, and access to the Internet means access to "an immense amount of information," including "speeches by world leaders [,] full texts of books, ... magazines, and newspaper articles, medical fact sheets [,] electronic discussion groups [,] library catalogs [,] college courses [,] recipes [,] games [,] Supreme Court rulings [,] legislation [,] scientific papers [,] government documents [,] music lyrics [,] software [,] sports schedules [,] weather reports [,] resumes [,] satellite images [,] and much more." [2] Nor is the Internet merely a giant, online library. In litigation recently filed in the Eastern District of Pennsylvania, the American Library Association [3] explains:

> [T] he Internet serves as the communications medium for literally tens of thousands of global conversations, political debates, and social dialogues. For example, on the Internet, one can view the full text of the Bible, all of the works of Shakespeare, and numerous other classic works of literature. One can browse through paintings from museums around the world, or view in close-up detail the ceiling of the Sistine Chapel, or see the latest photographs transmitted by the Jupiter space probe. One can even hear pieces of music or view clips of movies and videos over the Internet. [4]

{6} With such capacity, a computer with a modem for accessing the Internet is understandably considered a great good. Educators rightly have recommended equipping students with the means to take advantage of that good. [5]

{7} But suppose that a great good, such as Internet access to the world, was used for purposes not so good. In the months leading up to the enactment of the Communications Decency Act of 1996, [6] Congress was presented substantial evidence that computers, modems, computer networks and the Internet were being used to communicate obscene and indecent messages and images. Having apprised itself of the pervasiveness of indecent images and messages purveyed through computer communications, Congress enacted the CDA. Congress crafted the CDA to insure that, while adults remained free to create, view, read and exchange indecent computer communications, minor children would be shielded from such indecency. *See* Section I, *infra.*

{8} Those who have challenged the Communications Decency Act of 1996 have argued that the Act is not the least restrictive means to the end of protecting children from exposure to indecent online communication. Congress was presented with substantial evidence, however, that present, nongovernmental approaches were inadequate to prevent indecent communications to, and with, minor children. Present marketplace approaches place all burdens and responsibility for exposure to indecent communications on those who receive such communications, even unintentionally. Approaches such as the "parental control" features of the computer online services (such as America Online, Prodigy, and Compuserve) and the computer software filtering programs (such as NetNanny, SurfWatch and CYBERsitter), have not provided a sufficient level of satisfaction of the government interest in protecting minor children from exposure to indecent communications. *See* Section II, *infra.*

{9} The CDA survives facial constitutional challenge. The CDA does not ban all indecent computer communications; it only requires those who ***originate*** such communications to take responsibility for their availability to minor children. The CDA employs the least restrictive means to limit the accessibility of such materials to children, while leaving in place the opportunity to receive indecent communications and to communicate indecently for those adults who wished to do so. The CDA survives scrutiny of the

sort employed by the Supreme Court in *Sable Communications v. FCC* [7] and *FCC v. Pacifica Foundation.* [8] *See* Section III, *infra.*

DISCUSSION

I. Substantial Evidence Existed, Of Which Congress Was Made Aware, That There Was A Serious, National Problem Of Indecent Images and Messages Online

{10} On several occasions leading up to the enactment of the CDA, members of Congress were confronted by evidence that cyberspace--that electronic medium of communications existing in millions of computers, thousands of networks and hundreds of telephone systems--had become the Love Canal of the 1990's. Despite the best and brightest hopes, for good, for progress, for innovation, which inhere to the Internet, to the subordinate components of the Internet, and to other modes of online communication, what Congress discovered was an unrelenting effluent of the perverse, the indecent, the putrescent.

{11} The evidence presented to Congress showed that indecency and obscenity abounds in the online world. Seamy and unseemly depictions pervade: in graphic image files, in e-mail text messages, and in instantaneous online conversations. For over a year before the CDA was enacted, evidence of the problem of online indecency mounted in the *Congressional Record.*

{12} On July 26, 1994, Senator J. James Exon offered the Communications Decency Act as an amendment to the proposed Communications Act of 1994. [9] Senator Exon stated that the purpose of his amendment was to "help assure that the information superhighway does not turn into a red light district [and to] help protect children from being exposed to obscene, lewd, or indecent messages." [10] To buttress his proposal and validate his concern, Senator Exon caused to be included in the *Congressional Record* an article from the July 12, 1994 edition of the *Los Angeles Times* entitled, "Info Superhighway Veers into Pornographic Ditch." [11] That article, in turn, reported on a computer security breach at Lawrence Livermore National Laboratory in which computer hackers, including at least one Livermore employee, used Livermore computers to store and distribute pornography. [12] Senator Exon's remarks marked the beginning of a trail of evidence about online obscenity and indecency.

{13} On June 9, 1995, Senator Exon again spoke on the floor of the Senate in conjunction with an amendment he was submitting for the consideration of the Senate. [13] On that occasion, Senator Exon presented the now-famous "blue book," a blue-colored binder containing a "sample of what is available" "on the computer, on the information superhighway [.] " [14] That "blue" book provided a quick and shocking education to members of the Senate about the lewd and lascivious topics of discussion and subjects of images available free of charge online. Topics included:

> Multimedia erotica; erotica fetish; nude celebrities; pictures black, erotic females; pictures boys; pictures celebrities; pictures children; pictures erotic children; pictures erotica; pictures erotica amateur; pictures erotica amateur females; pictures erotica amateur males; erotica animal; erotica auto; erotica bestiality; ... bestiality, hamster, duct tape; ... erotica black females; erotica black males; erotica blondes; erotica bondage; erotica breasts. ... Erotica cartoons; erotica children; erotica female; erotica female, anal; erotica fetish; erotica fury; erotica gay men; erotica male; erotica male, anal; erotica Oriental; erotica porn star. [15]

{14} Senator Exon explained how commercial pornography enterprises used the Internet to boost sales:

> What do these entrepreneurs over here do, Mr. President? What they do is to use the free

> access, without charge advertising with the best of some of their pornographic, obscene material, and they put it over here on the Internet with their printing press. [] I am trying ... to stop these people over here essentially from using teasers, not unlike coming attractions that we see when we go to the movies . . . . [] When they, the pornographers over here, the money-making pornographers enter the free system of advertising, you do not even have to pay the price of going in and sitting down in a seat at a movie theater. What they do is take the best [sic] and most enticing pictures of whatever they want to sell that particular day or that particular week and they enter it over here on the Internet. They are posted on the bulletin board. And those are the ones, those are the pictures, those are the articles that are freely, without charge, accessible to very young children and to anyone else who wants to see them. [16]

{15} That day Senator Exon also caused two articles to be printed in the *Congressional Record.* [17] One article, "Police Cruise Information Highway," originally appeared in the June 8, 1995, edition of the *Omaha World-Herald.* The article reports,

> [p] olice in Fresno, Calif [ornia] , have a quick and dirty way to show parents how easily their children find sexually explicit material over computers: [t] hey bring parents in for show and tell. Surfing the Internet, police have unearthed sexually graphic conversations, photographs and X-rated movie clips, complete with audio. [18]

{16} On June 14, 1995, again relying on the "blue book," Senator Exon addressed the nature of materials available for free through the Internet.

> [I] t is no exaggeration to say that the most disgusting, repulsive pornography is only a few clicks away from any child with a computer. I am not talking just about Playboy and Penthouse magazines. By comparison, those magazines pale in offensiveness with the other things that are readily available. I am talking about the most hardcore, perverse types of pornography, photos, and stories featuring torture, child abuse, and bestiality. These images and stories and conversations are all available in public spaces free of charge. [19]

{17} On June 26, 1995, Senator Charles Grassley spoke in support of his legislation, the "Protection of Children from Computer Pornography Act of 1995. [20] Speaking to the motivation for his bill, which would have amended the federal criminal code, Senator Grassley warned the Senate of "the availability and the nature of cyberporn." He advised the Senate on a Carnegie Mellon University study of visual images available on the Internet:

> [o] f 900,000 images, 83.5 percent of all computerized photographs available on the Internet are pornographic. ... There is a flood of vile pornography, and we must act to stem this growing tide .... [21]

{18} Senator Grassley also submitted into the *Congressional Record* two articles detailing the problem.

{19} The first article, "An Electronic Sink of Depravity," first appeared in the American Spectator on February 4, 1995. Through this article, Senator Grassley placed before the Senate evidence of electronic narratives (hopefully fictional and apparently intended to fill someone's yearning for the truly horrible) more grotesque than almost the mind could contemplate (readily available on the Internet). [22] These narratives included two particularly disturbing ones, relating stories of torture-murders of little children:

> One is a six-year old boy named Christopher, who, among other indignities, suffers a

> castration -- reported in loving detail -- before being shot. The other is a girl named Karen, who is seven years old and is raped repeatedly by no fewer than nine men, before having her nipples cut off and her throat slashed. [23]

Congress must have been pained by the information put in the record by Senator Grassley. No doubt many were motivated to support regulation of obscenity and indecency online because they learned, as Senator Grassley intended, that, in the online world, works of electro-fiction describe "fathers sodomizing their three-year-old daughters ... mothers performing fellatio on their prepubescent sons ... girls coupling with horses ... the giving of enemas to child virgins [.] " [24]

{20} Senator Grassley's second submission was a series of articles related to cyberporn that appeared in Time Magazine in June, 1995. [25] From those articles, members of Congress learned how online services are used to distribute graphic images of bizarre sex even to cybervisitors who are not seeking out smutty sex and scatologica. For example, the article reports about an incident involving a ten-year old participating in a "chat room" offered by America Online for children ("the Treehouse"):

> [The] [t] en-year-old ..., a student at the Dalton School in New York City who likes to hang out with other kids in the Treehouse chat room on America Online, got E-mail from a stranger that contained a mysterious file with instructions for how to download it. He followed the instructions, and then he called his mom. When [his mother] opened the file, the computer screen filled with 10 thumbnail-size pictures showing couples engaged in various acts of sodomy, heterosexual intercourse and lesbian sex. [26]

{21} On July 24, 1995, the Senate Judiciary Committee conducted a hearing, "Cyberporn and Children: The Scope of the Problem, The State of the Technology and the Need for Congressional Action. (Cyberporn Hearing Statements)" [27] The hearing was conducted in connection with Senator Grassley's proposed legislation. The testimony during the "Cyberporn and Children" hearing further evinced the need for congressional action to address dangers to children from online indecency and obscenity.

{22} One parent who testified, Susan T. Elliott, M.D., recounted her family's experience with online pornography received through America Online. [28] Dr. Elliot explained that " [a] respected teacher suggested that they might benefit from information sharing on the Internet." [29] Based on the recommendation, the Elliot family logged onto America Online, a service choice influenced by the apparent ubiquity of "promotional discs from" that service. [30]

{23} Although Dr. Elliot supervised much of her sons' online activities, she was not present when her boys "ventured into the more exciting realm of ... 'private' chat rooms. Many of these rooms are private because they are specialized or technical, but some are private because they pertain to human sexuality." [31] While the Elliot children visited these racy, online speak-easies, "they were offered 'pictures' by other participants [and t] hey accepted a few of these, as did their classmates." [32]

{24} What the Elliot children received when they downloaded the "pictures" were depictions of "hard core pornography in full color ...." [33] The Elliots would never have discovered that their sons were receiving pornography except that her husband "noted that the memory of [their] computer was rapidly filling up." [34] In clearing memory, the Elliots opened up a "'trash' file and found the graphics in question. They portrayed varying numbers of humans and animals engaged in a horrifying gamut of sexual activities. The pictures were lewd and obscene by any standards." [35]

{25} The testimony of Dr. Elliot did not stand alone during the Cyberporn Hearing. [36] The Elliots experienced the problem of unsolicited invitations to obtain "pictures." But others who testified

experienced or observed even more ominous predatory behavior directed at young people.

{26} Donelle Gruff, from Safety Harbor, Florida, testified that while logged on one computer bulletin board system ("BBS"), a cybervisitor using the name "Bill" logged onto the online conference she was in and invited everyone to call his BBS. [37] What Donelle got when she signed onto Bill's BBS was more than she wanted: after "a couple of days he started asking me personal questions" such as "what bra size do I wear" and "would I blow him [?] " [38] Donelle signed off Bill's BBS and returned to the one where she first learned of Bill's BBS. [39]

{27} Bill immediately followed Donelle, electronically, to the other BBS, where he "kept telling [her] he was going to come to [her] house." [40] Late that night, after midnight, Bill showed up at Donelle's house. [41] Over the next two days, Bill returned to her house at least twice, even though police had been called to the scene. [42] On the weekend, Bill followed Donelle for several hours while she was with friends at a bowling alley. [43] The following week, he attempted to manipulate Donelle's computer electronically, including an attempt to force download pornographic pictures, one of which was transmitted to Donelle's computer and subsequently turned over to police. [44]

{28} In the testimony of Donelle Gruff, Congress was confronted with evidence of indecent electronic instantaneous messages, soliciting her participation in sex acts, with electronic and electronically-assisted stalking, and with indecent graphic images being transmitted without the recipient seeking out such images. Another witness documented the nonchalant approach of one online service to the problem of pervasive indecency in instantaneous online communications.

{29} Barry F. Crimmins purchased a computer and signed onto America Online. [45] Eventually, because he was an adult survivor of childhood sexual abuse and had heard of America Online's chatrooms for adult survivors, he took advantage of America Online's "People Connection," through which the chatrooms are entered for instantaneous online conversation. [46] As Crimmins perused an online list of chatroom names, he discovered

> numerous atrocious rooms. Many were obviously created by, and for, pedophiles. There were rooms promoting rape, incest, the exchange of child pornography, hate crimes, and every possible, and in some cases impossible, sexual activity. ... The first time [he] found the Abuse Survivors' room, it was located between a room called "DadsNDaughtrs" and another entitled "lilboypix." [47]

{30} Online, sometimes using his own name, other times using one of several undercover profiles, including that of a twelve-year old child, Crimmins testified that he had "been sent over a thousand pornographic photographs of children via" America Online. [48] Crimmins put evidence before Congress of the numerous chatrooms in which online indecency is concentrated on America Online. He testified about such rooms as "Nudist families," "Incest is best," "Have hot stepdaughter," "Hot4 auntie [,] " [sic] "boys in undies pics [,] " "Rape fantasy [,] " "hairless little vulvas [,] " "found pics of sis [,] " "dremz of little girls [,] " "teen masturbation [,] " "Likes em under 12 [,] " "girls underwear pics wntd [,] " "teen incest stories [,] " "My sis caught mechild pooorn [,] " and "Dads4 sons incest [.] " [49] In these rooms, Crimmins testified, "child pornography is exchanged, and incest is ... celebrated." [50]

{31} Believing that America Online ought to take responsibility for the things that occur within its cyberspace, Crimmins engaged in a long effort of correspondence seeking to obtain action by America Online to minimize or eliminate the pervasive pedophillic pornography online. [51] Ultimately Crimmins found America Online indolent and unresponsive to the problems he identified. Summing up his feelings about America Online, Crimmins said, "I am here to tell the American people that not only are their

children unsafe on AOL, their children are unsafe because of it." [52]

{32} While the CDA and Senator Grassley's bill were pending in Congress, that body had before it clear evidence that indecent and obscene online communications, like crude pollutants, were causing or threatening to cause real injury to minor children and to unwitting adults. The facts put before Congress by Senators Exon, Coats, and Grassley, and by witnesses at the Cyberporn Hearing, rose insurmountably to proof that the Internet, the online services, and the smaller computer bulletin boards were being used to facilitate a sleazy traffic in crude ruminations, dirty pictures, ominous stalkings, and promiscuous proposals. What remained to be done, and what is discussed below, was to determine whether the marketplace had provided an adequate response to the problem identified by Congress, and to craft an appropriate solution to the problem if necessary.

II. The Marketplace Had Failed To Provide Nongovernmental Means Less Restrictive Than Those Set Out In the Communications Decency Act of 1996 To Address Adequately The Problem Of Indecent Electronic Communications

{33} Opponents of the CDA have argued that other, less restrictive means, short of the provisions of the CDA, were available to safeguard the compelling interest of protecting children from online indecency. Consequently, they argue, the CDA fails constitutional scrutiny. For example, the American Library Association, arguing for a preliminary injunction against enforcement of the CDA, has asserted:

> The online medium offers the recipients of information a degree of control unmatched in any other medium. Not only can users affirmatively select the content of materials they view based on the subject matter of the particular service or the information contained in the headline or subject line, but there are also numerous -- and expanding -- methods for users to screen and block incoming materials they choose not to receive. [53]

{34} There are, of course, electronic prophylactics to online indecency. The issue is not their existence, but their efficacy. Among the prophylactic methods of filtering indecency are the "parental control" features built into such online services as America Online, Compuserve and Prodigy. [54] The "parental control" features *may be used* to:

> 1) block access to all newsgroups on the Internet, 2) block access to a specific newsgroup by entering a specific Internet address, 3)block access to all Internet newsgroups not listed in the AOL index, 4) block access to newsgroups that have ... photographs and sound recordings, and 5) restrict access to newsgroups that contain a particular string of characters, such as "sex" or "nudity," in the Internet addresses. [55]

{35} There are also various computer software packages *that may be used* to restrict children's access to indecent materials. One popular package, SurfWatch

> is automatically activated when the computer is started, and can only be deactivated with the parent's private password. When a user logs on to the Internet, SurfWatch cross-checks every attempt to access Usenet newsgroups, World Wide Web, gopher and ftp sites, or Internet Relay Chat (IRC) sessions against a list of sites known to contain sexually explicit material. In addition, SurfWatch uses a proprietary pattern recognition technology which blocks access to sites which contain certain words or word strings in their addresses. ... If a user attempts to access a site that is contained on the SurfWatch blocked site list, or a site containing certain key words or phrases, the user is prevented from accessing the site and

receives a message indicating the site has been "Blocked By SurfWatch." [56]

{36} Both approaches described above, as with all other methods of preventing exposure of children to indecent online communications, share two defects. First, they are not sufficient to accomplish the governmental purpose of preventing exposure of children to indecent materials online. Second, they all place the burden of failure on recipients of indecency rather than on creators and transmitters of indecency.

{37} Prior to enacting the CDA, Congress acquired evidence that, even with such prophylactics in place, minor children were being exposed to online indecency. [57] Congress had the famous "blue book" in front of it; Congress was informed of incidents such as the unsolicited transmission of graphic sex pictures to Anders Urmacher, the Elliot children's dabbling with very dirty pictures, the stalking of Donelle Gruff, the insouciant attitude of America Online to the problems identified by Barry Crimmins.

{38} Also, Congress had been apprised of the prophylactic methods described above. For example, one America Online executive, William Burrington, Assistant General Counsel and Director of Government Affairs, testified at the Cyberporn Hearing. [58] In his written testimony, Mr. Burrington explained the operation of parental controls provided by online services, such as America Online, and also explained about the availability and utility of SurfWatch and other software filters. [59]

{39} Given that Congress was aware of the prophylactic methods available for screening online indecency, and that Congress was aware that exposure of minor children to online indecency continued to be a problem, it was reasonable for Congress to conclude that the prophylactic methods were insufficient to meet the needs it had identified. Congress simply reasoned that the only sure way to effectively protect minor children from being exposed to online indecency was to shift responsibility from minor children and their parents to those whose conduct created the risk of exposure. Some may find it inconvenient to guard their language while children are around; others may suffer physical and psychological defects that strip them of the capacity to choose their words with care. But Congress was entitled to conclude from the evidence, though, that the prophylactic methods had failed to accomplish the goal of protecting children -- that the market had failed.

{40} The commercial entities responsible for these prophylactic approaches readily acknowledge that their products or approaches to filtering indecency are deficient. [60] Bill Duvall, the Chief Executive Officer of SurfWatch Software, Inc., explains that SurfWatch has to be regularly updated (something which his company will do for a fee) "because the number of sites on the Internet containing sexually explicit material is constantly changing ...." [61] In Duvall's view, "SurfWatch is a highly effective tool that can enable parents to better protect their children from objectionable material on the Internet." [62] But Duvall's understanding of "highly effective" is insightful:

> From our estimates, SurfWatch blocks 90 - 95 % of readily accessible sexually explicit sites on the Internet. This estimate is based on the assumption that most sites on the Internet containing sexually explicit material have been identified by our team of "net surfers" and added to the blocked site list, or contain key words in the sites address which are blocked by our pattern recognition technology. [63]

{41} Congress' ability to rely on Mr. Duvall's conclusion that SurfWatch was "a highly effective tool" had to be tempered by his candid use of terms like "estimates" and "assumption." Indeed, SurfWatch proceeds from a working hypothesis that "a substantial majority of sexually explicit Internet sites can be identified by one of several common key words in the address (e.g., "sex", "erotic", etc.)." [64] But SurfWatch's working hypothesis is not a settled rule. For example, to the extent that sponsors of Internet sites use

innovative site names and, consequently, avoid detection by SurfWatch's pattern recognition technology or other filtering software, the filters become ineffective. [65]

{42} Thus, Congress had evidence of a problem of online indecency and obscenity. And, Congress knew that the indecency flourished even when nongovernmental prophylactics were applied to the problem. Consequently, Congress correctly concluded that such less restrictive means would be ineffective to secure its interest in protecting minor children from the harmful effects of exposure to online indecency. That conclusion, regarding the efficacy of nongovernmental approaches, justified Congress' decision to address the problems of online indecency and obscenity through legislation.

III. The Communications Decency Act, Which Imposes Reasonable Restrictions On Electronic Communications, Is Facially Constitutional

{43} Congress enacted the Communications Decency Act as Title V of the Communications Act of 1996. The CDA requires those who create and distribute indecent materials to take responsible steps to insure that such materials are not displayed to, or communicated to, minor children. The CDA accomplishes this purpose through two key provisions.

{44} Section 502(1) of the CDA prohibits knowing use of a "telecommunications device" to make or create and "initiate [] the transmission of, any comment, request, suggestion, proposal, image, or other communication which is ... indecent, knowing that the recipient of the communication is under 18 years of age." [66]

{45} Section 502(2) of the CDA prohibits knowing use of an "interactive computer service" to make "patently offensive" communications to a specific person or persons under eighteen yeas of age. That section also prohibits knowing use of an "interactive computer service" to "display" "in a manner available to" a person under eighteen years of age "patently offensive" communications. [67]

{46} Key to the effective operation and enforcement of these provisions is the meaning of the term "indecency." The legislative history is clear on this point: Congress adopted the meaning of "indecency" given to it in federal court decisions such as *FCC v. Pacifica Foundation*. [68] Congress clearly communicated its intention to tap into the well-established line of precedent on application of the "indecency" standard in the Conference Report transmitting the Conference version of the Telecommunications Act of 1996. ("Conference Report") [69] The Conference Report states:

> The conferees intend that the term indecency ... has the same meaning as established in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989). These cases clearly establish the principle that the federal government has a compelling interest in shielding minors from indecency. Moreover, these cases firmly establish the principle that the indecency standard is fully consistent with the Constitution and specifically limited in its reach so that the term is not unconstitutionally vague. [70]

{47} A review of the decisions shows that, in legislative and administrative uses of the term "indecency," although some variations exist, the essence of its meaning is constant. "Indecency" means "patently offensive descriptions of sexual and excretory activities."

{48} As it considered the meaning of "indecency," the standard it was adopting, Congress rejected the "harmful to minors" standard. [71] The "harmful to minors" standard was proposed by some who urged

the need for such a standard to protect "material with 'serious literary, artistic, political, and scientific value [.] '" [72] In Congress' view, however, use of "harmful to minors" standard was not necessary to protect "'serious literary, artistic, political, and scientific value,'" because material could not be determined to be "patently offensive" "without a consideration of the context" and without showing both "the intention to be patently offensive," and "a patently offensive result." [73] By adopting the indecency standard as exposited in *Pacifica* and *Sable*, Congress demonstrated its manifest intention not to have treated as indecent materials that have "serious redeeming value [,] " that are "intended to edify and educate," that are not designed "to offend." [74]

{49} While the Supreme Court has said that " [s] exual expression which is indecent but not obscene is protected by the First Amendment [,] " [75] it has never held that indecent communications enjoy an absolute First Amendment privilege, or that governments are utterly powerless to respond to the problems associated with indecency. Rather, the Supreme Court has said:

> [t] he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. [76]

Further, the interest that prompted Congress to act, to protect children from the effects of exposure to indecent communications, has been recognized by the Supreme Court as one which is compelling:

> [w] e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. [77]

{50} Our Nation's duty to its children, to protect them from harm and to equip them for the future, has been recognized as a paramount obligation. With respect to the "dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene . . . ," the Supreme Court has stated, " [t] he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." [78] Of course, here the indecent images, messages and communications have not *necessarily* been produced with the involvement of children. [79] The threat to children from such indecent materials lies, not so much in its making, but in its immediacy and its ubiquity.

{51} Technological advances in communications -- telephone services, noncommercial computer bulletin boards, commercial online services such as America OnLine, Prodigy, Compuserve, and the Internet -- have galloped ahead of governmental regulation. Unsurprisingly, these fast-paced, evolving technologies have been used by those who have materials to communicate that are indecent. Children, at least some of whom are not even looking for sexually provocative electronic conversations or salacious portrayals of sexual or excretory activities, have been given ready access to indecent communications.

{52} In response to the serious problem outlined in Section I, Congress did not go overboard and enact a complete prohibition on indecency online. Obviously, in light of *Sable*, Congress knew that a sweeping prohibition would likely have been struck down judicially. Rather than prohibit adults from creating, using, viewing and exchanging indecent materials online, Congress merely shifted the burden of responsibility for indecent communications from recipients to the creators and traffickers in such communications.

{53} In *Sable*, the Supreme Court struck down a total ban on indecent interstate commercial telephone communications, [80] while affirming a ban on obscene interstate commercial telephone communications.

[81] The CDA, although also targeted at indecency, is quite different in character from the total ban on indecent telephone communications struck in *Sable*.

{54} In essence, the CDA imposes on creators of indecent communications the same sorts of gatekeeper responsibilities that the Supreme Court suggested in *Sable* would both serve the important government interests at stake and avoid unconstitutional restriction on indecent, but protected, communications among adults. An examination of the pertinent sections of the CDA demonstrates that the Act is neither a sweeping ban nor more restrictive of indecent communications than necessary to serve the compelling government interest at stake.

{55} Moreover, Congress did not ban all indecent communications through the CDA. Thus, appeals to the holding in *Sable* are unavailing. In *Sable*, the Supreme Court likened a flat ban on indecent interstate telecommunications to the constitutional equivalent of "burn [ing] the house to roast the pig [.] " [82] Here Congress concluded that indecent communication of images and messages online was the equivalent of giving the house to the pig and moving the family into the pig's pen.

{56} Congress did not violate the First Amendment Freedom of Speech or Freedom of the Press Clauses by enacting the CDA. The Supreme Court has upheld against constitutional challenge a system of regulation that does not ban indecent communications but restricts the time, place and manner of their communication so as to protect minors from exposure to them.

{57} In *FCC v. Pacifica Foundation*, [83] the Supreme Court upheld a declaratory judgment order of the Federal Communications Commission that the radio broadcast of a George Carlin monologue entitled, "Filthy Words," "was indecent and prohibited by 18 USC [sect.] 1464.'" [84] What the Supreme Court had to say about "indecent" radio broadcasting, and regulatory restrictions thereof, provides valuable guidance here. Unlike *Sable*, *Pacifica Foundation* addresses the regulation of indecency, rather than its complete prohibition. In that respect, the reasoning in *Pacifica Foundation* is directed to analogous, if not identical, concerns.

{58} At issue in *Pacifica Foundation*, Title 18 U.S.C. sect. 1464 prohibits the use of "any obscene, indecent, or profane language by means of radio communication." The FCC concluded that "the language used in the Carlin monologue [w] as 'patently offensive,' though not necessarily obscene ...." [85] For the Commission, which was admittedly seeking to restrict the availability of such materials to children, the context of the broadcast of the monologue was key: it was "'broadcast at a time when children were undoubtedly in the audience ....'" [86] After its order issued, the Commission clarified its order, stating it "'never intended to place an *absolute prohibition* on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'" [87]

{59} In *Pacifica*, the Supreme Court undertook the tasks of defining "indecent," [88] and of weighing the constitutionality of the Commission's judgment that "Filthy Words" was a prohibited broadcast of "indecent" language. In the Supreme Court, Pacifica Foundation argued that the Commission had misunderstood the statutory ban on radio broadcasting of "obscene, indecent, or profane" language. [89] Pacifica argued that the statutory term "indecent" had the same meaning as the term "obscene." [90] Consequently, in Pacifica's view, the absence of any prurient appeal in "Filthy Words" and the Commission's hesitance to declare the monologue obscene should have placed the monologue outside of the scope of the statutory ban on broadcasts of "obscene, indecent, or profane" language. [91]

{60} The Supreme Court was not persuaded by Pacifica's arguments; the Court relied on the commonly accepted meaning and dictionary definition of "indecent." " [T] he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." [92] To give content to "indecent," the

Supreme Court looked to the dictionary:

> Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY ... b: not conforming to generally accepted standards of morality; .... [93]

{61} Having arrived at its workable definition for "indecent," and having concluded that "the content of Pacifica's broadcast was 'vulgar,' 'offensive,' and 'shocking [,] '" [94] the Supreme Court next considered the context of the broadcast "because content of that character is not entitled to absolute constitutional protection under all circumstances ...." [95] *The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems."* [96] With respect to the broadcast of "Filthy Words," the Supreme Court reasoned that even though some quite offensive written message "might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." [97] Although irony in an opinion of the Supreme Court can be an effective forensic device, Congress enacted the CDA to cure a real problem, not a rhetorical one.

{62} "Filthy Words," in the context of its broadcast, was patently offensive. In *Pacifica Foundation*, the Supreme Court found the FCC's conclusions, that the monologue was indecent and that its broadcast violated federal law, fully justified. In a similar vein, the indecent electronic communications that are ubiquitous online fully justify Congress' decision to enact the CDA. The Act "does not by any means reduce adults to [communicating] only what is fit for children ...." [98] Instead, adults will continue to have available to them a panoply of indecent matter.

{63} Enactment of the CDA does not mean that indecent electronic communications will become unavailable. Under the standard Congress chose for "indecency," the term is applicable only to those materials created with "the intention to be patently offensive," and which showed "a patently offensive result." [99] All that the creators and users of online indecency must now do is either (1) avoid communicating indecency to minor children or posting indecent materials where minor children can have access to them or (2) avoid commerce in materials that are intentionally patently offensive and produce "a patently offensive result."

{64} Under the CDA, indecency has not been proscribed; access to indecency has been regulated because of our common interest in protecting minor children from exposure to it. The manner of regulation, permitting the discrete use and exchange of it among adults, is the least restrictive one available that will accomplish the important government purpose of protecting children. Inapposite appeals to the First Amendment cannot shield purveyors of indecency from reasonable regulation. The CDA is constitutional on its face.

ENDNOTES

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of cases in the United States Supreme Court dealing with constitutional and civil rights questions.

[1] 141 CONG. REC. S8329 (daily ed. June 14, 1995) (statement of Sen. J. James Exon) (quoting Senate Chaplain Lloyd Ogilvie). Not everyone welcomed Dr. Olgivie's decision to express the thoughts contained in his prayer. Senator Patrick Leahy of Vermont apparently took offense to the prayer and to, as he saw it, Dr. Olgilvie's interloping in the business of the Senate. *See* CONG. REC. S8331 (daily ed. June 14, 1995) (statement of Senator Leahy) ("perhaps he should allow us to debate these issues and determine how they come out and maybe pray for our guidance, but allow us to debate them. He may find that he has enough other duties, such as composing a prayer each morning for us, to keep him busy").

[2] *Cyberporn: Protecting Our Children From the Back Alleys of the Internet: Joint Hearing Before the Subcommitee on Basic Research and the Subcommitee on Technology of the Committee on Science*, 104th Cong., 1st Sess. 8 (1995) (CRS background memorandum on the Internet).

[3] There have been two lawsuits filed, since the enactment of the Communications Decency Act of 1996, challenging the Act as facially unconstitutional. *See* ACLU, et al. v. Janet Reno, No. 96-963 (E.D.Pa. 1996); American Library Association, et al. v. United States Department of Justice, et al., No. 96-1458 (E.D.Pa. 1996). Pursuant to sect. 561 of the Communications Decency Act of 1996:

> [A]ny civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

Communications Decency Act of 1996, sect. 561(a). Furthermore:

> [A] n interlocutory or final judgment, decree, or order of the court of 3 judges in an action [challenging the facially constitutionality of the Communications Decency Act of 1996] holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

Communications Decency Act of 1996, sect. 561(b).

[4] *See* Complaint para. 63, in ALA, et al. v. United States Dep't of Justice, et al., No. 96-1458 (E.D.Pa. 1996).

[5] *See* "Statement Regarding Pornography on the Internet" in *Cyberporn and Children: The Scope of the Problem, The State of the Technology, And The Need for Congressional Action: Hearings on S.892 Before the Committee on the Judiciary*, 104th Cong., 1st Sess. (July 24, 1995) (to be published in 1996).

[6] The Communications Decency Act of 1996 was enacted as Title V of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (104th Cong., 2nd Sess., Feb. 6, 1996).

[7] 492 U.S. 115 (1989).

[8] 438 U.S. 726 (1978).

[9] 140 CONG. REC. S9745 (daily ed. July 26, 1994) (remarks of Senator Exon).

[10] *Id.* at S.9746.

[11] *Id.*

[12] *Id.*

[13] 141 CONG. REC. S8087-91 (daily ed. June 9, 1995) (remarks of Senator Exon).

[14] 141 CONG. REC. at S8089.

[15] 141 CONG. REC. at S8089.

[16] 141 CONG. REC. at S8090.

[17] 141 CONG. REC. at S.8091.

[18] 141 CONG. REC. at S8091.

[19] 141 CONG. REC. S8330 (daily ed. June 14, 1995) (remarks of Senator Exon).

[20] 141 CONG. REC. S9017 (daily ed. June 26, 1995) (remarks of Senator Grassley).

[21] 141 CONG. REC. at S9017.

[22] *Id.*

[23] 141 CONG. REC. at S9018.

[24] *Id.*

[25] 141 CONG. REC. S9019-21.

[26] 141 CONG. REC. S9019-20.

[27] The witness list for the hearing and copies of the written submissions of the witnesses are available through the Senate Judiciary Committee. The hearing transcript and submissions will be published as *Cyberporn and Children: The Scope of the Problem, The State of the Technology, And The Need for Congressional Action: Hearings on S.892 Before the Committee on the Judiciary*, 104th Cong., 1st Sess. (to be published in 1996). References to the prepared statements of the witnesses at the hearing are references to copies of those statements, obtained from the Judiciary Committee.

[28] *See Statement Regarding Pornography on the Internet* in "Cyberporn Hearing Statements," *supra* note 27.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Nor did the evidence received by Congress at that hearing, or otherwise, show that such predatory behavior was limited to efforts to affect young men. Another mother who testified at the Cyberporn Hearings testified about an incident involving her daughter and her daughter's friends:

> Early this summer, my thirteen-year old daughter went to her friend's house ... to play on the computer. They were in the neighborhood; they were properly supervised; and I knew they were safe. It was shocking to discover later what they had experienced that afternoon.
>
> The girls were in a teenage chatroom on America Online, and were propositioned for "cybersex." Initially, they thought it was funny, giggling as you'd expect thirteen-year olds would, but as the requests became raunchier, they were frightened.

See Child Pornography on the Internet in "Cyberporn Hearing Testimony," *supra* note 27.

[37] *See* Statement of Donelle Gruff in "Cyberporn Hearing Statements," *supra* note 27.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See Testimony of Barry F. Crimmins* in "Cyberporn Hearing Statements," *supra* note 27.

[46] *Id.* at 4.

[47] *Id.* at 5.

[48] *Id.*

[49] *Id.* at 6-7, 22.

[50] *Id.* at 7.

[51] *Id.* at 9-11, 13-21.

[52] *Id.* at 11.

[53] Plaintiffs' Memorandum in support of motion for preliminary injunction, ALA, et al. V. U.S. Dep't of Justice, et al., No. 96-1458 (E.D. Pa. 1996), at 21.

[54] *See* Declaration of Sheila A. Burke at para. 10-13 (Exhibit 8 in support of the ALA Plaintiffs' Motion for a Preliminary Injunction) in ALA, et al. v. U.S. Dep't of Justice, et al., No. 96-1458 (E.D. Pa. 1996).

[55] *Id.*

[56] *See* Declaration of Bill Duvall at para. 13-14 (Exhibit 14 in support of ALA Plaintiffs' Motion for Preliminary Injunction), ALA, et al. v. U.S. Dep't of Justice, et al., No. 96-1458 (E.D. Pa. 1996).

[57] *See* Discussion Section I, *supra.*

[58] *See Written Testimony of William W. Burrington* in "Cyberporn Hearing Statements," *supra* note 27.

[59] *Id.* at 8-11.

[60] Access providers acting like common carriers, "solely ... providing access or connection to or from a facility, system or network under [its] control," are not liable for the "transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection" involving indecent material. *See* Pub. L. No. 104-104, sect. 502(e)(1), 110 Stat. 56 (104th Cong., 2nd Sess., Feb. 6, 1996).

[61] *See* Declaration of Bill Duvall para. 16 (Exhibit 14 in support of the ALA Plaintiffs' Motion for Preliminary Injunction); *see also* Declaration of Nigel R. Spicer para. 24-26 (Exhibit 31 in support of the ALA Plaintiffs' Motion for Preliminary Injunction) (explaining the purposes and mechanics of "Cyber Patrol," another filtering software program).

[62] *Id.* at para. 22.

[63] *Id.* at para. 23.

[64] *Id.*

[65] During evidentiary hearings on the motions for preliminary injunctive relief against enforcement of the Communications Decency Act of 1996, Ann Duvall of SurfWatch, Inc., the developer of a leading filtering software, admitted on cross-examination that "Surfwatch did not block every potentially harmful site to children, and that her employees routinely come up with ones they had missed or new ones being added." Amy Harmon, *Online Decency Hearing Begins in U.S. Court*, Los Angeles Times, March 22, 1996, at B5.

[66] *See* Pub. L. No. 104-104, sec. 502(1), 110 Stat. 56 (104th Cong., 2nd Sess., Feb. 6, 1996).

[67] In pertinent part, section 502(2) of the CDA provides:

> (d) Whoever-
>
> (1) in interstate or foreign communications knowingly-
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
>
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

See Pub. L. No. 104-104, sect. 502(2), 110 Stat. 56 (104th Cong., 2nd Sess., Feb. 6, 1996).

[68] 438 U.S. 726 (1978). The Supreme Court has granted review in another case, Alliance For Community Media v. FCC, 56 F.3d 105, 1124-25 (D.C. Cir. 1995), *cert. granted sub. nom.*, Denver Area Education Telecommunications Consortium v. FCC, 116 S.CT. 471 (1995), in which the meaning of the statutory term "indecency" is at issue. In addition to the discussions of it in *Pacifica Foundation* and *Sable*, the term "indecency" has been given close treatment in several other cases. *See, e.g.*, Action for Children's Television v. FCC, 58 F. 3d 654, 662-63 (en banc) (D.C. Cir. 1995), *cert. denied*, 64 U.S.L.W. 3465 (1996); Dial Information Services Corp. of New York v. Thornburgh, 938 F.2d 1535, 1540-41 (2d Cir. 1991) *cert. denied sub. nom.*, Dial Information Services Corp. of New York v. Barr, 502 U.S. 1072 (1992); Action for Children's Television v. FCC, 932 F. 2d 1504, 1508 (D.C. Cir. 1991).

It was to this rich doctrinal development of the term "indecency" that Congress turned in its enactment of the CDA.

[69] *See* H.R. REP. NO. 458, 104th Cong., 2nd Sess. 188 (1996)

[70] Conference Report at 188, *supra* note 69.

[71] *See* Conference Report, *supra* note69, at 189 (discussing the "harmful to minors" standard in Ginsberg v. New York, 390 U.S. 629, 641-43 (1968)).

[72] Conference Report, *supra* note 69, at 189.

[73] Conference Report, *supra* note 69, at 189 (citing In the Matter of Sagittarius Broadcasting Corp. et al, 7 FCC Rcd. 6873, 6875 (1992) and In the Matter of Audio Enterprises, Inc., 3 FCC Rcd. 930, 932 (1987)).

[74] Conference Report, *supra* note 69, at 189.

[75] *Sable Communications*, 492 U.S. at 126.

[76] 492 U.S. at 126.

[77] 492 U.S. at 126.

[78] New York v. Ferber, 458 U.S. 747, 753, 758 (1982).

[79] Indeed, one wave of new and unfortunate developments in the creation of indecent and obscene depictions of child sexual activity was reported to the Senate by Orrin Hatch of Utah, in remarks he made introducing legislation addressed to the problem of computer generated simulations of child pornography. Senator Hatch explained an incident in which one cyberwierdo used imaging and graphics software to remove the clothing from photographs of children and then manipulated the images to place the children in positions of suggested sexual activities. *See* 141 CONG. REC. S13542 (daily ed. Sept. 13, 1995) (statement of Senator Hatch). Senator Hatch said:

> The necessity for prompt legislative action amending our existing Federal child pornography statutes to cover the use of computer technology in the production of such material was vividly illustrated by a recent story in the Washington Times. This story, dated July 23, 1995, reported the conviction in Canada of a child pornographer who copied innocuous pictures of children from books and catalogs onto a computer, altered the images to remove the childrens' clothing, and then arranged the children into sexual positions. According to Canadian police, these sexual scenes involved not only adults and children, but also animals.

141 CONG. REC. at S13542.

[80] 492 U.S. at 126-31.

[81] 492 U.S. at 124-26.

[82] *Sable*, 492 U.S. at 127 (citation omitted).

[83] 438 U.S. 726 (1978).

[84] 438 U.S. at 732 (citation omitted).

[85] 438 U.S. at 731 (citation omitted).

[86] 438 U.S. at 732 (citations omitted).

[87] 438 U.S. at 733 (citations omitted, emphasis added).

[88] 438 U.S. at 739-41.

[89] 438 U.S. at 739-40.

[90] *Id.*

[91] *Id.*

[92] 438 U.S. at 740.

[93] 438 U.S. 740 note14, (Quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

[94] 438 U.S. at 747.

[95] *Id.*

[96] 438 U.S. at 748 (citation omitted).

[97] 438 U.S. at 749.

[98] 438 U.S. at 750 note28 (*citing* Butler v. Michigan, 352 U.S. 380 (1957)).

[99] *See* Conference Report, *supra* note 69, at 189.